IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

GOOD LUCK GLOVE COMPANY, a Corporation,
Petitioner,
vs.
CHESTER BOWLES, Administrator, OFFICE OF PRICE ADMINISTRATION,
Respondent.

No. 618

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
For the Seventh Circuit

and

BRIEF IN SUPPORT THEREOF.

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Cases Cited.

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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Good Luck Glove Company, a corporation, respectfully petitioning, shows this Honorable Court:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

On November 3, 1943, the Administrator brought suit in the United States District Court for the Eastern District of Illinois against petitioner, alleging that petitioner had

violated the Emergency Price Control Act of 1942, as amended, in that petitioner had sold and delivered work gloves manufactured by it at prices in excess of the maximum prices fixed by General Maximum Price Regulation, as amended. The Administrator asked, in Count I, for an injunction (R. 8) and, in Count II, for treble damages and judgment against petitioner in the amount of $250,000 (R. 9-10). Count III of the complaint is not now involved.

The District Court, after introduction of evidence and a full hearing on the application for injunction, filed a written opinion (R. 124) together with certain findings of fact and conclusions of law (R. 131), and entered judgment denying the motion for preliminary injunction (R. 133) on the ground that the Administrator had not shown by the evidence that the petitioner had engaged or was about to engage in any acts or practices constituting a violation of the Emergency Price Control Act of 1942, or the General Maximum Price Regulation issued thereunder. The opinion of the District Court is reported in 52 Fed. Supp. 942.

Respondent appealed from that judgment and the Circuit Court of Appeals affirmed the same (R. 168). The opinion of the Circuit Court of Appeals is reported in 143 Fed. (2d) 579.

Thereafter, on July 26, 1944, petitioner filed its motion in the United States District Court for a summary judgment as to Count II (R. 3). A hearing was had on the motion for summary judgment and affidavits filed by the parties, and the District Court readopted its findings of fact and conclusions of law on the former hearing (R. 150), and entered judgment on the merits in favor of petitioner as to Count II (R. 152).

II.

RULING OF CIRCUIT COURT OF APPEALS.

On appeal by respondent from the summary judgment in favor of petitioner, the Circuit Court of Appeals for the Seventh Circuit reversed the judgment of the District Court and remanded the cause (R. 170). The opinion (R. 168) is reported in 150 Fed. (2d) 853. The Court gave the following reasons for reversing its former decision:

(1) That the decision in the case of **Bowles, Admr., v. Seminole Rock and Sand Co.** (65 S. Ct. 1215, 89 L. Ed. Adv. Op. 1186, June 4, 1945), had the effect of holding that the previous opinion expressed by the Circuit Court of Appeals in the injunction proceeding was erroneous;

(2) That the decision in the **Seminole** case was not distinguishable on the ground that a different price regulation was involved;

(3) That the decision in the **Seminole** case required a reversal of the summary judgment in favor of petitioner notwithstanding certain undisputed facts appearing in the record relating to a general price increase by petitioner on March 20, 1942, and delivery of gloves during March 1942, at the increased prices.

III.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended [28 USCA 347(a), C. 426, 48 Stat. 926].

The opinion of the Circuit Court of Appeals was filed August 3, 1945 (R. 169). On August 17, 1945, within the time permitted, petitioner filed its petition for rehearing (R. 170), which was denied on September 11, 1945 (R. 171).

This petition was filed before the expiration of three months from September 11, 1945.

IV.

STATEMENT OF THE FACTS.

Petitioner is engaged in the manufacture and sale of work gloves. Its sales are principally to wholesalers, jobbers and mail order houses. On March 20, 1942, it published a new price list setting forth new prices for all of its various types or models of work gloves, of which over four thousand copies were mailed to prospective customers (R. 56, 131). This superseded its last previous price list issued December 15, 1941.

The General Maximum Price Regulation was issued April 28, 1942, to become effective May 11, 1942. While the General Maximum Price Regulation did not fix dollars and cents ceiling prices, it was designed to fix ceiling prices at the current prices prevailing in March 1942.

During the month of March 1942 petitioner received and accepted new orders for work gloves at its new March 1942 prices from more than three hundred customers in an amount exceeding $100,000.00, and, pursuant thereto, deliveries were made during March 1942 at such increased prices of many of petitioner's different work glove models (R. 57, 131).

Petitioner did not, at any time after March 1942, sell, ship or deliver any of its work gloves at a price or prices higher than those specified in its March 1942 price list (R. 3, 131).

The only work gloves delivered by petitioner during the month of March 1942 at prices less than the March 1942 price list were deliveries of certain models made pursuant to firm commitments and contracts which had been entered into prior to the month of March 1942 (R. 4, 58, 131).

Some models of petitioner's work gloves were not delivered at all during March 1942 (R. 57).

For each model or type of glove not sold and delivered by petitioner during March 1942 at the prices shown in

its March 1942 price list, there was an identical or substantially equivalent model or type of glove which was actually sold and delivered by petitioner during March 1942 at the increased prices fixed in the March 1942 price list (R. 129, 148).

Thus, four situations are involved:

(1) Actual sales and deliveries in March 1942 of large quantities and numerous models of petitioner's work gloves at the new March 1942 prices for the respective models (R. 57);

(2) Deliveries of certain models during March 1942 solely pursuant to prior commitments or contracts at prices lower than the increased prices established for those models by the new March 1942 price list (R. 58);

(3) No deliveries during March 1942 of some models listed on the March 1942 price list (R. 57);

(4) As to models not delivered during March 1942 at the increased prices (which includes those models delivered at lower prices because of prior firm commitments), there were identical or substantially equivalent models which were sold and delivered during March 1942 at the increased prices (R. 129, 148).

Respondent admits that the March 1942 price list fixed the legal maximum prices:

(a) as to all models sold and delivered during March 1942 at the prices shown on said price list; and

(b) as to all models which were not delivered at all during March 1942.

But respondent contends that, as to those models of gloves which were delivered during March 1942 **only** under pre-existing contracts at prices lower than the

March 1942 price list, the prior contract prices at which they were delivered constitutes the petitioner's maximum prices for those particular models, notwithstanding Amendments 23 and 38 to General Maximum Price Regulation and notwithstanding the undisputed facts as found by the trial Court of actual sales and deliveries during March 1942 of identical or substantially equivalent models at the increased March prices shown on petitioner's March 1942 price list.

The entire transcript of the hearing on the application of the Administrator for a temporary injunction, together with the opinion of the District Court and the findings of fact, conclusions of law and judgment, were made a part of petitioner's motion for summary judgment (R. 4).

The finding of the District Court that petitioner and its officers, during all of the time involved in this suit, believed in good faith that they were complying with the applicable provisions of the General Maximum Price Regulation (R. 132) has not been challenged.

V.

QUESTIONS PRESENTED.

1. Whether the Circuit Court of Appeals erred in holding that, in view of the case of **Bowles, Admr., v. Seminole Rock and Sand Co.** (65 S. Ct. 1215, 89 L. Ed. Adv. Op. 1186, June 4, 1945), its former opinion in the injunction case and the summary judgment of the District Court in this case were erroneous.

2. Whether the Circuit Court of Appeals erred in not giving any consideration to the findings of fact by the District Court that for each glove model not sold and delivered during March 1942, petitioner actually sold and delivered during March 1942 an identical or substantially equivalent model at its increased March 1942 prices.

VI.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The Circuit Court of Appeals has erroneously held that the decision of this Court in **Bowles, Admr., v. Seminole Rock and Sand Co.** (65 S. Ct. 1215, 89 L. Ed. Adv. Op. 1186, June 4, 1945), was conclusive against petitioner. The facts in this record are materially different, the Regulation involved is different, Amendments 23 and 38 to the General Maximum Price Regulation are involved here but were not involved in the **Seminole** case, and the Circuit Court of Appeals has misapplied the rule of law announced in the **Seminole** case with respect to the construction of Maximum Price Regulation 188. The important federal question as to the proper construction of the General Maximum Price Regulation as amended, has not been, but should be, settled by this Court.

2. The Circuit Court of Appeals has erroneously disregarded the findings of fact by the District Court that for each glove model or type of glove not sold and delivered during March 1942, the petitioner did sell and deliver during March 1942 an identical or substantially equivalent model at the increased March 1942 price. The proper construction of the General Maximum Price Regulation, where identical or substantially similar commodities were delivered during March 1942, is an important question of federal law which has not been, but should be, settled by this Court.

3. The grievous and obvious error of the Circuit Court of Appeals in the two foregoing respects places in grave jeopardy the entire business of this petitioner (treble damages being asserted in the amount of $250,000), notwithstanding that its good faith stands unchallenged and that it never sold a glove in excess of the increased prices announced by its March 1942 price list.

Wherefore, petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in the case of **Chester Bowles, Admr., Office of Price Administration, v. Good Luck Glove Company**, No. 8696, and that the decree of said Circuit Court of Appeals in said cause be reversed, and that petitioner have such other and further relief in the premises as to this Court may seem just.

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PETITIONER'S

BRIEF

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the District Court denying an injunction on the ground that petitioner had not violated the General Maximum Price Regulation appears at pages 124-130 of the record, and is reported in 52 Fed. Supp. 942.

The opinion of the Circuit Court of Appeals affirming that judgment is reported in 143 Fed. (2d) 579.

The District Court, in rendering summary judgment for petitioner, readopted the findings of fact, conclusions of law, and written memorandum entered by the Court on the injunction hearing (R. 151), and judgment on the merits for petitioner as to Count II of the complaint was entered without further opinion (R. 152).

The opinion of the Circuit Court of Appeals for the Seventh Circuit, reversing the judgment in favor of petitioner, filed August 3, 1945, appears at pages 168-9 of the record, and is reported in 150 Fed. (2d) 853. No opinion was filed overruling petitioner's motion for rehearing (R. 171).

II.

JURISDICTION.

A statement particularly disclosing the jurisdiction of this Court is set out in the foregoing petition at page 3.

III.

STATEMENT OF THE CASE.

A statement of the facts is made in the foregoing petition at pages 4-6, and is not here repeated.

IV.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals erred:

1. In holding that the decision in the case of **Bowles, Admr., v. Seminole Rock and Sand Co.** (65 S. Ct. 1215, 89 L. Ed. Adv. Op. 1186, June 4, 1945) required a reversal of the judgment in favor of petitioner.

2. In reversing the judgment of the District Court notwithstanding the findings of fact, the correctness of which the Circuit Court of Appeals did not question, that for each glove model not sold and delivered during March 1942, petitioner actually sold and delivered during March 1942 an identical or substantially equivalent model at its increased prices fixed by its March 1942 price list.

V.

ARGUMENT.

1. The Circuit Court of Appeals erred in holding that the decision of this Court in the Seminole case was conclusive against petitioner under the facts in this record.

The suit in the **Seminole** case was under Maximum Price Regulation 188. The suit in this case is under the General Maximum Price Regulation and Amendments 23 and 38 to that Regulation. This Court carefully pointed out in its opinion in the **Seminole** case* that neither of these amendments to the General Maximum Price Regulation was in issue in that case. Both of these amendments are in issue in this case and appear, together with the Administrator's press releases in connection therewith, at pages 97-104 of the record. Furthermore, as petitioner points out below, the facts in this case are so materially different from those in the **Seminole** case that the latter should not be controlling even if there were no substantial differences in the applicable price regulations.

The decision by the Circuit Court of Appeals places on the same basis a seller who made no general price increase prior to April 1, 1942, and a seller who made such a general price increase but happened to be bound by prior firm commitments to make certain deliveries during March 1942, of some of his line at the lower contract prices. The General Maximum Price Regulation and the opinion of this Court in the **Seminole** case recognize a clear distinction between the two cases.

Petitioner now points out the first significant distinction between this case and the **Seminole** case.

In the **Seminole** case there was no evidence of a general price increase during March 1942. In this case petitioner issued and circulated its new price list on March 20, 1942,

*89 L. Ed. Adv. Op. 1186, footnote 9, at p. 1190, 65 S. Ct. 1215 at p. 1219.

and distributed it to more than four thousand prospective customers (R. 125, 131). During March 1942 it accepted new orders for work gloves at the March 1942 prices from more than three hundred customers in an amount exceeding $100,000 (R. 57, 131). It did not, at any time after March 1942, ship, sell or deliver any work gloves at a price or prices higher than those specified in its March 1942 price list (R. 125), and on the hearing respondent conceded that petitioner never charged more than its March 1942 offering prices (R. 48). Petitioner did not, during March 1942, make any deliveries of gloves at prices less than those shown in its March 1942 price list (R. 58, 75), except deliveries which it was obligated to make under pre-existing firm contracts (R. 125), and under the amendments to General Maximum Price Regulation such deliveries are not controlling as to the legal maximum prices which may be charged.

Amendments 23 and 38 to the General Maximum Price Regulation (R. 97-104) have been carried into the text of the Regulation as a proviso following Sec. 1499.2, paragraph (c), which proviso reads as follows (R. 121):

> "Provided, however, that (1) if before April 1, 1942, the seller raised his prices for a commodity or service to all his classes of purchasers (or to all his classes of purchasers except those to whom he was bound to make delivery or supply during March 1942, pursuant to a firm commitment made before the price rise) and
>
> "(2) If during March 1942, he delivered the commodity or supplied the service at the increased price to at least one class of purchasers, then, in order to allow the seller to apply the price rise to any class of purchasers to which no delivery or supply was made during that month after the price rise (except under a firm commitment made before the price rise), the highest price charged during March 1942, shall be deemed to be:

> "(i) The seller's increased offering price to such class of purchasers for delivery or supply during March, 1942, or * * *."

In this case the increased offering price is represented by petitioner's March 1942 price list; it constitutes an offering price under respondent's definition of that term in Sec. 1499.2 of the Regulation (R. 123).

That it was the intent of the Administrator to allow a general price increase which was put into effect prior to April 1, 1942, to be applied to purchasers after the termination of pre-existing contracts, is made manifest by the press releases which accompanied the amendments (R. 97-104). These declared that:

> "Sellers who made general price increases prior to April 1 are authorized * * * to apply the increases to ceiling prices for goods and services delivered last March under long term contracts."

The press releases specifically declared that:

> "The effect is to allow one who, last March, delivered at prices established by a contract signed many months before and who raised his prices **generally** before April 1st, to bring his prices on the expiration of the contract in line with the increased prices he was charging in March" (R. 101, 127).

The contention of respondent that there must have been, during March 1942, an actual sale and delivery of each special type or model of glove at the March prices, makes entirely meaningless the proviso above quoted. If each type or model manufactured by petitioner were delivered in March 1942 at its increased offering price determined by its March 1942 price list, **then such delivery at such price would, of itself, establish the legal maximum price under the first part of Sec. 1499.2, and there would be no occasion for the proviso.** The proviso

can only be given effect in cases where there was a general price increase prior to April 1, 1942, and certain deliveries were made only under firm commitments entered into before the month of March 1942.

Even under the restricted and erroneous construction which respondent now places upon the Regulation, it appears from this record that petitioner, prior to April 1, 1942, did make a general price increase for a "commodity" (work gloves) to all classes of purchasers except those to whom it was bound to make deliveries during March 1942 pursuant to a firm commitment made before such general price increase; that during March 1942 petitioner delivered the "commodity" (work gloves) at the increased prices to "classes of purchasers" who had no pre-existing contracts; and that the "commodity" was also delivered to other purchasers at a lower price **but only** under firm commitments made before the general price increase. Under these circumstances, in order to allow petitioner to apply the price rise to any class of purchasers to which no delivery or supply was made during March 1942 after the price rise (except purchasers under a firm commitment made before the price rise) the proviso above quoted declares that the highest price charged during March 1942 shall be the seller's increased offering price. Thus, the clear intent of the Administrator was to "freeze" ceiling prices on a manufacturer's line, **where a general price increase had been put into effect by legitimate offering prices**, at the current March 1942 levels and not to penalize the manufacturer by ceiling prices determined by prior contract commitments. In the **Seminole** case there was no general offering price of the commodity, but only two contracts, both pre-existing, with the only delivery in March 1942 at the lower of the two contract prices. That was a wholly different situation than the situation existing in this case. With both the facts and the applicable regulation materially different,

the Circuit Court of Appeals obviously erred in its belief that the **Seminole** case required it to reverse its own former view.

The Circuit Court of Appeals has thus decided an important question of federal law which has not been, but should be, settled by this Court, and particularly is this the case where it has erroneously based its ruling on a decision of this Court in a case where the facts are substantially different and the applicable maximum price regulation contains substantially different provisions.

2. **The Circuit Court of Appeals further erred in disregarding the findings of fact made by the District Court that for each glove model or type of glove not sold and delivered during March 1942, petitioner actually sold and delivered during March 1942 an identical or substantially equivalent model at its increased March 1942 prices.**

Petitioner now points out the second significant distinction and fundamental difference between this case and the **Seminole** case as to which the Circuit Court of Appeals clearly erred. It is the legal effect of a sale and delivery by petitioner in March 1942 at the increased March 1942 prices of identical or substantially equivalent models or types of work gloves.

The Circuit Court of Appeals erroneously held that the District Court made no findings of fact as to this. The District Judge, at the close of his opinion, states:

> "This memorandum shall constitute a part of my findings of fact and conclusions of law adopted contemporaneously herewith" (R. 130).

On the hearing for summary judgment, the District Court readopted its findings of fact entered on the injunction hearing, "together with the written memorandum of the Court" (R. 151).

On the injunction hearing many models of gloves were offered in evidence (R. 72), and the District Court found:

> "In short, for all practical purposes, for each model not sold in March, there is an identical or equivalent model that was sold. This is identity in the contemplation of the practical determination of law" (R. 129).

In connection with the summary judgment hearing, the record further shows the following in the affidavit of petitioner's Vice President in charge of sales:

> "* * * that for every lot number or description of glove not actually sold and delivered by the defendant during the month of March 1942, at the prices shown in the March 1942 price list, there was an identical or substantially equivalent glove sold and delivered by the defendant during March 1942 at the prices fixed in the March 1942 price list" (R. 148).

A single illustration will make the findings of fact of the District Court abundantly clear. We refer to glove models 172 and 172N. The material, cost and construction of these two gloves are identical, and both always sold at the same price. The only difference between them is that one has the twill side of the cloth to the palm and the nap to the outside, while the other has the nap side of the cloth to the palm and the twill to the outside (R. 59-60). Model 172 was not sold or delivered except under pre-existing contracts. Model 172N was sold and delivered during March 1942 at the March 1942 prices. Respondent admits that subsequent sales and deliveries of glove model 172N at the March 1942 price were lawful sales, but contends that subsequent sales of glove model 172 at the March 1942 prices violated the General Maximum Price Regulation.

None of the foregoing evidence is disputed and the findings of fact with respect thereto as made by the trial court, under well-established principles of law, are conclusive on appeal. Therefore, in legal effect, there was a sale and

delivery by petitioner of all of its glove models during the month of March 1942 at the March 1942 increased prices, because any reasonable application of the phrase "the same commodity" contained in Section 1499.2 (a) (1) of General Maximum Price Regulation includes equivalent models. No question of the sale and delivery of identical or substantially equivalent commodities was involved in the **Seminole** case.

This important question of federal law has been erroneously decided by the Circuit Court of Appeals and has not been, but should be, settled by this Court. Particularly is this the case where the error of the Circuit Court of Appeals is the result of its failure to give consideration to the findings of fact by the trial court, the correctness of which findings was not questioned by the Circuit Court of Appeals.

In conclusion, it is submitted that both of the reasons relied on for allowance of the writ are vital and fundamental. If this Court should fail to review and correct the misapprehension of the Circuit Court of Appeals that the **Seminole** case required it to change its own prior opinion in the instant case and to reverse the summary judgment of the District Court, and should fail to correct the clearly erroneous interpretation placed on the proviso amending General Maximum Price Regulation (R. 121-122), or should fail to correct the error committed by the Circuit Court of Appeals in disregarding the findings of fact by the District Court as to the sale and delivery of identical or substantially equivalent models or types of "the same commodity," a grave injustice will have occurred with an exceedingly serious financial result to this petitioner ($250,000 asserted damages). While, of course, it does not appear in this record, other litigants who acted with equal good faith in the manufacture

and sale of work gloves are faced with exactly the same questions and unless this Court shall review and correct the ruling in the instant case, a precedent will have been established under which other companies* similarly situated will also be forced to pay heavy damages under a construction of an administrative regulation which is unjust and inequitable and which Congress never intended to sanction by any language to be found in the Emergency Price Control Act. The questions presented are, accordingly, of such general and far-reaching importance that they should be settled by this Court.

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* See Appendix hereto for list of suits pending.

APPENDIX

APPENDIX.

List of other suits filed by the Office of Price Administration against work glove manufacturers involving like alleged price violations and known by this petitioner to be pending:

Bowles, Adm'r, v. Boss Manufacturing Company, pending in U. S. District Court, Southern District of Illinois, Northern Division;

Bowles, Adm'r, v. Universal Glove Company, pending in U. S. District Court, Northern District of Ohio, Western Division;

Bowles, Adm'r, v. Wells Lamont Corporation, pending in U. S. District Court, Northern District of Illinois, Eastern Division;

Bowles, Adm'r, v. Indianapolis Glove Company, Application to U. S. Supreme Court for writ of certiorari to Seventh Circuit Court of Appeals.

The aggregate damages asked by the Administrator in these cases is in excess of $500,000.